SUPREME COURT

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# SUPREME COURT OF THE UNITED STATES

**October Term, 1968**

**No. _____**

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LOUISVILLE AND JEFFERSON COUNTY AIR BOARD, - - - - - - *Petitioner,*

*v.*

CURTIS SHIPP and BERNIE SHIPP, - *Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

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1. (a) The opinion of the Court of Appeals of Kentucky to which this petition for certiorari is directed is *Curtis Shipp, et ux.* v. *Louisville and Jefferson County Air Board, et al.*, Ky., 431 S. W. 2d 867. A copy of the opinion is appended hereto. There is no other "official" report of the decision. A copy of the unreported memorandum opinion of the trial court is likewise appended.

(b) (i) The date of the decision sought to be reviewed was June 7, 1968.

(ii) Final judgment was entered, upon a denial of a petition for rehearing, on October 18, 1968.

(iii) Jurisdiction to review by certiorari is conferred by 28 U. S. Code § 1257(3).

The exercise of the Court's discretion in favor of granting the writ is sought under Rule 19(1)(a) of its Revised Rules, in that the decision is not in accord with the decision of this Court in *Griggs* v. *Allegheny County*, 369 U. S. 84. It is a matter of importance to local airport authorities throughout the country.

(c) 1. Do acts which amount to a *"taking"* of property by a local airport authority, when exercised over a period in excess of fifteen years, give rise to a public easement by *prescription,* authorizing the airport authority to remove obstructions from the easement?

2. Is the Air Board entitled to an injunction to protect it in going on to the property of the respondents for the purpose of removing obstructions existing in the public easement?

In the case of *Griggs* v. *Allegheny County,* 369 U. S. 84, this Court held that the local authority was the one who had "taken" an easement over Griggs' nearby property through the operation of its airport, although the local authority operated no airplanes, or otherwise, itself, used Griggs' property. In the case at bar and Louisville and Jefferson County Air Board has done exactly what Allegheny County did in the *Griggs* case and has done it since 1941.

The Court of Appeals of Kentucky dismissed the argument under the *Griggs* case with the statement that "The Air Board has no prescriptive right for the simple reason it has not exercised adverse rights in the space involved for fifteen years; * * *."

It is the contention of the Petitioner that the same acts that constituted a "taking" in the *Griggs* case necessarily gave rise to a prescriptive easement for public use in this case, after the period of fifteen years —the statutory period in Kentucky. It is to this key question that we believe this Court must direct its attention.

The easement is a *public* one. The Air Board is merely the agency for protecting it.

(d) The sole basis for this petition is the failure of the Kentucky court to follow *Griggs* v. *Allegheny County,* 369 U. S. 84.

The following statutes and regulation are involved:

"KRS 183.011. Definitions of aviation terms. * * * (4) 'Air navigation facility' means any facility other than one owned or controlled by the United States, used in, available for use in, or designed for use in, aid of air navigation, including airports, rights, interests or easements in the navigable air space and any structures, mechanisms, lights, beacons, markers, communicating systems, or other instruments or devices used or useful as an aid, or constituting an advantage or convenience, to the safe taking off, navigation and landing of aircraft, or the safe and efficient operation or maintenance of an airport, and any combination of any or all of such facilities.

* * * * * * *

"(8) 'Airport hazard' means any structure, object or natural growth, or use of land, which obstructs the air space required for the flight of aircraft in landing or taking off at any airport or is otherwise hazardous to such landing or taking off.

"(9) 'Approach zone' means that area extending from the end of an airport runway in an inclined plane and increasing in elevation at a given ratio of horizontal to vertical feet, and which area may be more particularly identified and described

by referenec to the Technical Standard Orders of the Federal Aviation Agency.

* * * * * * *

"(15) 'Navigable air space' means air space above the minimum altitudes of flight prescribed by the regulations of the Federal Aviation Agency or department consistent therewith, and includes the air space necessary for normal landing or take off of aircraft."

* * * * * * *

"KRS 183.133(1). The purpose of the board shall be to establish, maintain, operate, and expand necessary, desirable or appropriate airport and air navigation facilities. It shall have the duty and such powers as may be necessary, or desirable to promote and develop aviation, including air transportation, airports, and air navigation facilities."

* * * * * * *

"49 U.S.C. § 1301(24). 'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft."

* * * * * * *

"49 U.S.C. § 1304. There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States. Pub.L.85-726, Title I, § 104, Aug. 23, 1958, 72 Stat. 740."

It is stipulated (¶ 7), that the prescribed "clear zone" requires a glide angle of 50 to 1. This is based

on Technical Standard Order Number 18 which is now published as 14 Code of Federal Regulations § 77.27(b). For convenience we quote this portion of the Regulation. In case the Court does not know ILS means "Instrument Landing System."

> "(b) *ILS approach surface.* A surface longitudinally centered on the extended centerline of an ILS runway, beginning at the end of the primary surface and extending outward and upward at a slope of 50 to 1 for a horizontal distance of 10,000 feet and at a slope of 40 to 1 for an additional 40,000 feet. This surface is the width of the primary surface at the beginning and expands uniformly to a width of 16,000 feet as a distance of 50,000 feet from the end of the primary surface."

## (e) STATEMENT OF THE CASE.

There is no dispute about the facts material to a decision. They were largely stipulated.

Standiford Field (which is the name of the airport involved) was started in 1939 and actually commenced operations in 1941. An aerial photograph, dated March 1, 1941, filed with the Stipulation, shows the layout of the Field with the then proposed Runway 1-19 drawn in. The area was open farm land. There is also an engineer's drawing filed, giving the exact measurements involved, both flat and in profile.

The Stipulation contains all of the facts that seemed to us to be pertinent:

> "By agreement of the parties hereto, by counsel, the following facts are stipulated.

"1. Standiford Field is operated, pursuant to KRS 183.133, by the Louisville and Jefferson County Air Board.

"2. It was operated by the United States Government from 1942 until 1947, when it was returned to the Air Board following World War II, and is, and at all times herein involved has been the major commercial and industrial airport serving the city of Louisville area.

"3. Eastern Airlines, American Airlines, Transworld Airlines, Delta Airlines, Piedmont Airlines, Ozark Airlines and Lake Central Airlines operate regular commercial schedules into Standiford Field in excess of sixty flights per day.

"4. The Kentucky Air National Guard operates a squadron of planes with headquarters at Standiford Field, and there are numerous other military, government and private landings and take-offs at and from the Field.

"5. Runway 1-19 is the longest and, because of prevailing winds, the most used at the Field. Recent studies indicate that approximately 35% of all landings and 13% of all take-offs are on this runway. During the year 1966, there were 123,062 such operations at the Field.

"6. While the number of operations has grown, the continuous use of the runway has been substantially the same since 1947 and was substantially used by the Military for the period between 1942 and 1947. Jets have been operated since 1946. Four-engine planes operated prior thereto.

"7. The prescribed 'clear zone' for approaches to Runway 19 (TSO-N18) requires a glide angle

of 50 to 1, as shown by the engineer's drawing attached hereto. Regular approaches to the runway are above this level. It is the margin of safety prescribed by the Federal Aviation Administration.

"8. Mr. and Mrs. Curtis Shipp, the defendants, reside and own the property at 4038 Pylon Court, Louisville, Kentucky. They purchased it and have lived there continuously since 1963. The property is a lot 75 feet by 122 feet and is improved with a 1½ story brick veneer three-bedroom house, with full basement. It has a garage and a patio in the back yard. The house is in good condition and well landscaped and is worth approximately $19,500.00.

"9. In the rear of the back yard are two pin-oak trees standing 50.9 feet and 39.7 feet high. The house is 22½ feet high from the ground and the fireplace chimney is 23½ feet from the ground. The elevation of the ground on the defendants' property does not vary more than one foot. The trees shade the outside patio, the rear yard, the back of the house, part of the roof and make the premises cooler, more beautiful and in general a more pleasant, desirable and valuable place to live.

"10. The trees are situated approximately 1400 feet North of the end of Runway 19 and approximately 600 feet West of the center line of said Runway, if extended.

"11. In late 1966 or early 1967, VASI equipment costing approximately $50,000 was installed at the airport for the purpose of controlling the altitude of approaching planes. The Federal Aviation Agency will not permit the use of said equipment unless the trees are cut down into the

clear zone, which would mean that approximately 25 feet or one-half of the taller tree would have to be removed and fifteen feet of the shorter tree would have to be removed. In all probability, this would kill both of the trees. Pin-oaks grow at the rate of one and one-half feet per year in Kentucky.

"12. Although the number of flights and noise level near and over the defendants' property have gradually increased, the defendants have never complained to the Air Board nor has there been any damage to their property as a result of said flights.

"13. Filed herewith is an aerial picture dated March 1, 1941, which shows the property of the airport with Runway 19 drawn on it. There are trees shown in said picture which are in the proximate location, but may or may not be the same trees.

"14. It is the contention of the Air Board:

That it acquired, on behalf of the public, a prescriptive right to a clear zone approach to Runway 19 at an angle or glide path of 50 to 1 in 1956 (fifteen years after the Field went into operation), and that it has the right and duty to remove obstructions from said clear zone thereafter occurring.

"15. It is the contention of the defendants:

That the Air Board acquired no property rights to any particular way of passage for aircraft as they have always had the right to use the navigable air space above defendants' land so long as the flights do not materially and substantially interfere with the use and enjoyment of defend-

ants' property, but that these rights of the Air Board cannot be enlarged upon so as to enter defendants' property and remove the trees in question. If it is deemed necessary to remove the trees in question, condemnation is the appropriate action to be taken."

(f) This action was originally filed by the Kentucky Airport Zoning Commission (created in 1960), to require the defendants to remove their trees, at their own expense, under the provisions of the Airport Zoning Law. The trial court held that the remedy of the Commission was to condemn the trees. Thereupon the Louisville and Jefferson County Air Board intervened in the action and asserted its *title by prescription,* on behalf of the public, to the unobstructed use of the lower stratum of air space over the defendants' property for the passage of aircraft, and requested the right at its expense to go on to the property of the defendants and "top" the two trees that had grown up into the clear zone.

The trial court sustained the right of the Air Board and dismissed the complaint of the Airport Zoning Commission. The posture of the case on appeal, therefore, was between the property owners and the Louisville and Jefferson County Air Board alone.

The whole theory of the case for the Air Board, of course, is bottomed upon the decision of this Court in *Griggs* v. *Allegheny County,* 369 U. S. 84. Unless the Air Board, on behalf of the public, has acquired an easement to maintain the open character of the area as it has existed for more than fifteen years, the only

remedy open is to condemn an easement and a right to enter on the property of the defendants to keep the approach zone clear.

This question was raised by the intervening petition, was sustained by the trial court and simply brushed aside by the Court of Appeals of Kentucky with the observation that the Air Board "has not exercised adverse rights in the space involved for fifteen years." The petition for rehearing, filed in the Court of Appeals, is a part of the record here and shows the insistence made below upon the applicability of the *Griggs* case, even though it was ignored by the Court of Appeals in its opinion. We submit that the *Griggs* case is controlling in this case.

(h) **ARGUMENT.**

As stated by the Court itself in *Griggs* v. *Allegheny County,* 369 U. S. 84:

> "The question is whether the respondent has taken an air easement over petitioners' property for which it must pay just compensation as required by the Fourteenth Amendment."

There is no difference between what was done by Allegeheny County in the *Griggs* case and what was done by the Louisville and Jefferson County Air Board in the present case. The air lines used both airports as lessees of the sponsor. Military and private planes are in almost constant operation. The *Griggs* opinion states:

> "It is argued that though there was a 'taking' someone other than respondent was the taker—the air lines or the C.A.A., acting as an authorized representative of the United States. We think, however, that respondent, which was the promoter, owner and lessor of the airport, was in these circumstances the one who *took* the air easement in the constitutional sense. Respondent decided, subject to the approval of the C.A.A., where the airport would be built, what runways it would need, their direction and length, and what land and navigation easements would be needed * * *. We see no difference between its responsibility for the air easements necessary for the operation of the airport and its responsibility for the land on which the runways were built."

If the Air Board has the same responsibility for approach zones as it has for runways, and under *Griggs* this is so, it likewise acquires rights like any other landowner. The acts which constitute a "taking" are bound to give rise to a legal right after fifteen years. Indeed, prescriptive rights arise even when they are not "adverse." The rule is thus stated by Judge Elliott (who was later assassinated, but not for his decision in this case), *Downey* v. *Urton* (1878), 10 Ky. Op. 143:

> "* * * if there is a passway over a man's land which his neighbor has used, not by his permission merely but under a claim of right for more than twenty years, then such neighbor has a right to continue to use the passway, and it becomes unlawful to obstruct it or hinder his use of it."

More recent cases to the same effect are *Pickel* v. *Cornett,* 285 Ky. 189, 147 S. W. 2d 381, 382, and *Lyle* v. *Holman,* Ky., 238 S. W. 2d 157. The prescriptive right arises from the *use*—at common law, the presumption of a lost grant.

The limits of the prescriptive easement are not simply the traveled portion of the air, but include the area needed for the safe operation of the approach zone. For example, the SS "Queen Mary" with a beam of 119 feet could not safely dock in a berth 120 feet wide, if any tide was running. By the same token, a "Boeing 707," with a wing spread of 154 feet, or the new "Lockheed C5A," with a wing spread of 222.7 feet, could not safely land, with only a foot or two to spare, through an avenue of trees.

The extent of the easement required is obviously the limits fixed by the Technical Standard Orders of the Federal Aviation Agency, which originally was "TSON18" and is now Title 14 of the Code of Federal Regulations, Chapter 1, § 77.27, Subsection (b). It is stipulated (¶ 7) that the prescribed clear zone requires a glide angle of 50 to 1 as shown on the engineer's drawing. It is therefore unnecessary for the Court to examine the somewhat recondite regulation.

As is shown by KRS 183.011(15), quoted above, the "navigable air space" includes the air space necessary for normal landing or take-off of aircraft. The general rule, as stated in 39 C.J.S. "Highways," 937 § 20, is:

> "User sufficient to create a highway by prescription establishes the public character of the

> road or highway. The width of a highway so created is generally coextensive with the extent of actual user for road purposes, and comprehends not only the traveled track, but also such other land as is *actually, reasonably, and necessarily used* for highway purposes incidental to use of the track."

In the text it states that:

> "The easement is not, however, necessarily limited to the beaten path * * * but carries with it * * * such width as is *reasonably necessary* for the *safety* and *convenience* of the traveling public * * *."

We have found no Kentucky cases on the exact point but it is submitted that the rule as stated in Corpus Juris makes sense and must be the law.

So far as Federal law is concerned, 49 U.S.C. § 1301(24) (following the decision in *U. S.* v. *Causby,* 328 U. S. 256), defines "navigable airspace" to "include airspace needed to insure safety in take-off and landing of aircraft" and by 49 U.S.C. § 1304 a public right of freedom of transit through the navigable airspace is recognized.

These laws were all in force at the time when Mr. and Mrs. Shipp bought their property in 1963.

With all due respect to the Court of Appeals of Kentucky, we submit that there is nothing to condemn. The easement claimed for the public by the Air Board already exists. The only problem is whether or not the Air Board can keep the easement free of obstructions.

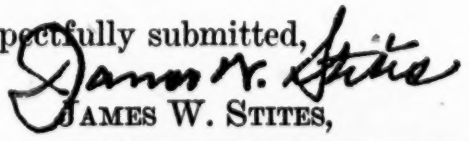
Under the decision of this Court in the *Griggs* case, it is submitted that the Air Board "took" the easement

over the property in question when planes began to fly through the lower stratum of air in their approach to Runway 19. This right became absolute after fifteen years of operation—and existed *before respondents purchased their property* in 1963.

It is respectfully suggested that this is a question which is common to all airports throughout the country and of far more importance than the immediate case. The *Griggs* case can not be ignored. We ask that this Court so advise the Court of Appeals of Kentucky.

We have appended (1) the opinion of the Court of Appeals, (2) the opinion of the Franklin Circuit Court, and (3) the mandate of the Court of Appeals of Kentucky, which is the only "judgment" of that court. Notice has been given the clerk that parties other than petitioner and Mr. and Mrs. Shipp have no interest in the outcome of this petition, pursuant to Rule 21(6).

Respectfully submitted,



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# APPENDIX

## APPENDIX 1.

# COURT OF APPEALS OF KENTUCKY

RENDERED: JUNE 7, 1968

431 S. W. 2d 867

CURTIS SHIPP, ET UX., - - - - *Appellants,*

*v.*

LOUISVILLE AND JEFFERSON COUNTY AIR BOARD, ET AL., - - - - *Appellees.*

*Appeal from Franklin Circuit Court,*
*Honorable Henry Meigs, Judge.*

## OPINION OF THE COURT BY JUDGE EDWARD P. HILL—REVERSING.

The appeal seeks to upset a judgment authorizing appellees to remove the tops of two oak trees standing on appellants' residential property, which appellees claim violate rules and regulations promulgated by the Kentucky Airport Zoning Commission (hereafter K.A.Z.C.) and constitute a hazard to the safe and modern operation of Standiford Field in Jefferson County, Kentucky.

This action was commenced by K.A.Z.C. under KRS 183.873; subsequently, Louisville and Jefferson County Air Board (hereafter Air Board) was allowed to intervene. The action was dismissed as to K.A.Z.C., and its complaint is not in this record. Apparently the trial court held that K.A.Z.C. could not maintain its suit for the reason that its

proper remedy was to condemn the trees pursuant to the provisions of KRS 183.872.

The trial court decided that the Air Board had made a more substantial claim and that it has a "prescriptive right" to the public, unobstructed use of the stratum of air space over appellants' property for the purpose of the landing and the take-off of aircraft from its airfield, including the space in which its VASI equipment operates.[1]

The case was tried on an agreed stipulation of fact from which we find that one of the trees is 50.9 feet tall; that the other is 39.7 feet tall; that pin oak trees grow at the rate of "one or one and one-half feet per year in Kentucky"; that appellants purchased their property in 1963. Obviously the trees were more than twenty feet high when appellants purchased their property.

The judgment appealed from ordered that appellants allow appellees to enter upon their land and top the trees so that the stubs shall not exceed 20 feet in height from the ground. Bond was required of appellees to protect appellants from any consequential injury or damage to the remainder of their property, but not for any damage resulting from the loss of parts of the trees.

It is conceded that appellants have a right under KRS 183.133 to condemn the obstructing trees as did K.A.Z.C. under KRS 183.872, but this is not a condemnation proceeding. Appellees contend that "if the Air Board, after 25 years of operation, must condemn every tree that grows

[1]This equipment projects three color bars or layers of light for some distance from runways used by landing aircraft. While landing, the pilot endeavors to keep within the middle color bar. If he flies into either of the other color bars, he is too high or too low for instrument landing and can correct his course accordingly. Any obstruction in the path of the space covered by these color bars that extends more than twenty-five feet high will interfere with the desired performance of the VASI equipment. It is claimed that the Federal Aviation Administration will not permit the use of this equipment until the trees are cut low enough to allow the light to pass.

up into the approach zone, an impossible burden is placed on its shoulders." True since 1942, this airfield has been operated either by the Air Board or by the Federal Government as stipulated.

Appellants contend the law does not authorize prescriptive air easements; that if the court should find such an easement does exist, it should be limited by its actual use and exercise over the last fifteen years and cannot be enlarged upon or expanded for an entirely new purpose; and that the judgment of the trial court amounts to a taking of their property in violation of the State and the Federal Constitutions.

Appellees contend that they have acquired, on behalf of the public, a prescriptive right to a "clear zone" approach to runway 19 at an angle or glide path of one foot rise or fall for each fifty-foot distance, depending upon whether there is a landing or a takeoff; that its right arose in 1956, fifteen years after the field went into operation; and that the Air Board has the right and the duty to remove obstructions from the "clear zone" existing since 1956.

The trial court adjudged that appellees have a "prescriptive right to the public, unobstructed use of the lower stratum of air space" over appellants' property.

Congress exercised its constitutional power to regulate interstate air commerce by providing in 49 U.S.C. § 1304 that there be "public right of transit through navigable airspace of the United States"; and then defined "navigable airspace" in 49 U.S.C. § 1301(24) as:

> "[T]he airspace above the minimum altitude of flight prescribed by regulations issued under this Chapter and shall include airspace needed to insure safety in take-off and landing of aircraft."

This airspace has been held to be within the public domain. Cf. City of Newark, New Jersey v. Eastern Airlines, D.C. (N.J.), 159 Fed. Supp. 750 (1958).

It is concluded that the Air Board has a right to "airspace above the minimum altitude of flight prescribed by reasonable" regulations issued under 49 U.S.C. § 1301(24), which "shall include airspace needed to insure safety in take-off and landing of aircraft."[1] Obviously this "airspace" would include the space into which VASI equipment operates. This right is one derived from an act of Congress in its exercise of police powers and the regulation of interstate commerce by air. After the adoption of the rules and regulations under 49 U.S.C. § 1301(24), no property owner in the path of the rays of the VASI equipment may erect or allow to grow any structure or tree so as to interfere with the operation of such equipment.

The Air Board has no prescriptive right for the simple reason it has not exercised adverse rights in the space involved for fifteen years; however, it appears that in the instant case, the trees had exceeded the 20-foot elevation objected to before the commencement of the use of VASI equipment and before the adoption of rules and regulations applying thereto.

Appellants' right to maintain and enjoy their trees was acquired before the right of the Air Board was fixed by law. Although appellants' right was not in conformity with the zoning rules of K.A.Z.C., nevertheless, such right is protected by the Constitution and may not be taken except by condemnation under KRS 183.133(4) and (5).

The judgment is reversed.

All concur.

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[1] Strother v. Pacific Gas & Electric Co., Cal., 211 P. 2d 624 (1949).

## APPENDIX 2.

# FRANKLIN CIRCUIT COURT

**Civil Action No. 71129**

KENTUCKY AIRPORT ZONING COMMISSION, - *Plaintiff,*
LOUISVILLE & JEFFERSON COUNTY
AIR BOARD, - - - - *Intervening Plaintiff,*

*v.*

SHIPP, - - - - - - - - *Defendants.*

## MEMORANDUM OPINION.

In this action, initiated by the Kentucky Airport Zoning Commission, it was determined that the original plaintiff could not remove defendants' trees by mandatory injunction, since that plaintiff had an adequate remedy at law by condemnation proceedings. Subsequently, Louisville & Jefferson County Air Board was permitted to intervene and set up its claim against the same defendants and their offending trees.

A much more substantial claim is made by intervenors as it is grounded in rights of property, well established and existing more than twenty-eight years, whereas, as more fully appears in the order denying original plaintiff's complant for injunction, removal of defendants' trees was sought in furtherance of an exercise of the police power of the state never conceived until 1961.

Most of the relevant and pertinent facts surrounding the situation giving rise to the suit have been stipulated between the parties. In addition, the Court takes notice, as it believes to be within its proper function, that many, if

not all approaches to airport runways are comprised of two parts, the first consisting of a base leg, perpendicular to the direction of the intended landing, and the final approach on alignment with the landing runway—or a combination of these two resulting in a radial or parabolic curve of flight producing an ultimate alignment, on a sloped path, with the runway on which landing is to be made.—It is also recognized that the economics of commercial aviation dictate flight-planning to result in "straight-in" approaches by southbound aircraft when and where local traffic directs landing on runways "16", "17", "18", "19",—and so on around the compass—but it is clear that not all, or perhaps even a majority of flights can be so completed without a final turn into the proper runway alignment.

Still greater precision and wider margins of safety are required in the execution of "instrument approaches", and it is in the operation of equipment employed to facilities and control this type of landing that intervenor seeks to enforce its claim to unobstructed use of the air space 1400 feet Northwardly of Runway 1-19 and 600 feet Westwardly of that center-line.

It has been determined that defendants' two pin-oak trees have grown, in the course of natural development, into the airspace above the area bounded by these coordinate points, perhaps before and certainly since dominion over the surface from which the trees spring was begun to be asserted by defendants (1963). Although a slope ratio of 50-1 has been established as a safety criterion, it is not possible as a matter of fact—nor as a matter of aeronautics —to determine whether, nor the extent to which flight has been made along this pre-determined slope within the airspace into which these trees now protrude, but it is certain from the nature of airports and the varied quality of man's efforts at aerial flight that this exact space—as well as much other—has been occupied frequently and persistently,

if not consistently, since 1939, at least until coincident growth of defendants' trees effectively prevented it.

Having thus procured and, through uninterrupted notorious user established prescriptive right to exclusive passage through the air-space in question, the Louisville & Jefferson County Air Board is entitled to keep the same open and unobstructed for its own uses and purposes, against obstruction or interference by any surface owner beneath.

By the allegations and prayer of its complaint intervenor seeks only to be allowed the right it claims, and which is so declared here, to cause topping or removal of defendants' encroaching trees *at its own expense.* Accordingly, it is ordered and adjudged that intervenor has such rights as herein set forth, by prior prescriptive acquisition, and may enforce same by topping or removal of defendants' said trees, at its own complete expense, saving defendants harmless from any and all consequential injury or damage to the remainder of their property by restoring the premises, after topping or removal of said trees to the same condition as that in which it may now be found, loss or curtailment of the two said trees excepted, and to secure defendants therein intervenors shall post with the Clerk of said Court bond, with sufficient surety thereon, in the sum of $2,500.00 before entering upon the premises of defendants. To the extent necessary to a determination that the requirements of the aforesaid bond have been satisfied this cause will remain on the docket for further consistent orders. For all other purposes this shall be and constitutes a final disposition of the action. Judgment may be entered in conformity hereto, counsel for intervenor to prepare and first exhibit same to counsel for defendants and counsel for plaintiff.

This 17th day of August, 1967.

/Sd/ Henry Meigs,
*Judge, Franklin Circuit Court.*

## APPENDIX 3.

THE COMMONWEALTH OF KENTUCKY

THE COURT OF APPEALS

Spring Term—June 7, 1968

CURTIS SHIPP, ET AL.,

*v.*

LOUISVILLE & JEFFERSON COUNTY AIR BOARD, ET AL.

CA 71129

*Appeal from a Judgment of the Franklin Circuit Court.*

### MANDATE.

The Court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed for proceedings consistent with the opinion herein: which is ordered to be certified to said court.

It is further considered that the appellants recover of the appellees their cost herein expended.

A copy—Attest:
Dick Vermillion, C.C.A.
Doris Owens, C.C.A.
By (s) John C. Scott, C.D.C.

Issued October 18, 1968.

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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 943

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**LOUISVILLE AND JEFFERSON COUNTY AIR BOARD, - - - - - Petitioner,**

*versus*

**CURTIS SHIPP and BERNICE SHIPP, - Respondents.**

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## BRIEF IN OPPOSITION.

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## STATEMENT OF QUESTIONS PRESENTED.

1. Is the Judgment of the Kentucky Court of Appeals supported by an independent and adequate state ground thus depriving the Supreme Court of the United States of jurisdiction?

2. Is the Judgment of the Kentucky Court of Appeals, in any way, contrary to the decision in Griggs v. Allegheny County 369 U. S. 584?

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LOUISVILLE AND JEFFERSON COUNTY AIR BOARD, - - - - - *Petitioner,*

*v.*

CURTIS SHIPP and BERNICE SHIPP, - *Respondents.*

---

## BRIEF IN OPPOSITION.

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### STATEMENT OF THE CASE.

The petitioner, Louisville and Jefferson County Air Board, claims to have acquired an air easement by prescription which entitles it to cut down two (2) trees belonging to the respondents, Curtis Shipp and Bernice Shipp, his wife, without compensation.

The statement of the case by the petitioner is essentially correct, as most of the facts were stipulated; however, there was evidence introduced by the respondents not referred to in the petitioner's Statement of the Case, and in order to bring it to the Court's attention in its proper context the respondents will briefly summarize the case.

The trees are pin oaks standing 50.9 and 39.7 feet high. They shade the back of the house, part of the

roof, the outside patio, the rear yard and make the premises cooler, more beautiful and in general a more pleasant, desirable and valuable place to live.

The trees are situated approximately 1400 feet North of the end of Runway 19 and approximately 600 feet West of the center line of said Runway, if extended.

In late 1966 or early 1967 VASI equipment costing approximately $50,000.00 was installed at the airport for the purpose of controlling the altitude of approaching planes. The Federal Aviation Agency will not permit the use of said equipment unless the trees are cut down into the clear zone which would mean that approximately 25 feet or one-half of the taller tree would have to be removed and fifteen feet of the shorter tree would have to be removed. In all probability this would kill both of the trees. Pin oaks grow at the rate of one or one and one-half feet per year in Kentucky.

Although the number of flights and noise level near and over the defendants' property have gradually increased, the defendants have never complained to the Air Board nor has there been any damage to their property as a result of said flights.

Although aircraft have been taking off and landing at Standiford Air Field for more than fifteen (15) years they have never flown over the trees in question while so doing. The reason for this is that the trees are 600 feet West of the center line of the runway at a point only 1400 feet North of the end of the runway (R. 9-12). The evidence omitted by the petitioner in

its statement of the case and never denied by the petitioner is that the planes have never flown within 250 feet of the trees in taking off and never flown closer than 300 feet during landings. The planes were also at least 150 feet above the ground while taking off and 200 feet above the ground when landing (R. 28-29).

The Kentucky Court of Appeals decided that the Air Board had not exercised adverse rights in the space involved for fifteen (15) years; that the trees had exceeded the 20 foot elevation objected to before the commencement of the use of VASI equipment and before the adoption of rules and regulations applying thereto; that the appellants' right to maintain their trees was acquired before the rights of the Air Board was fixed by law; that appellants' rights are protected by the Constitution and cannot be taken away except by condemnation under Kentucky Revised Statutes 183.133 (4) and (5) (R. 49-50).

## ARGUMENT.

### A. The Judgment Sought to be Reviewed is Supported by an Independent and Adequate State Ground, Thus Depriving the United States Supreme Court of Jurisdiction.

This case involves the same principal of law which was applied in Jankovish v. Indiana Toll Road Comm., 379 U. S. 487. The Court of Appeals of Indiana had held that the airport zoning regulations were unlawful and unconstitutional because they permitted appropriation of property rights without payment of compen-

sation. The Supreme Court of the United States granted a writ of *certiorari* because it appeared that the case presented questions affecting the National Airport Plan not previously considered. The Court, after hearing the arguments, dismissed the writ of *certiorari* holding:

> "It is undoubtedly the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment."

It is respondents' contention that the judgment sought to be reviewed is supported by an independent and adquate state ground. A brief review reveals this to be the case.

The petitioner has a license to fly its planes in the manner in which it has been doing. In order to increase the licensed privileges into prescriptive rights he must go further and abuse the license thus breaching some duty owed to the landowner so as to give rise to a cause of action. Jackey v. Burkhead, Ky., 341 S. W. 2d 64, held:

> "In order to establish title to an easement by prescription, the adverse possession must be actual, open, notorious, forcible, exclusive and hostile and must continue in full force for at least 15 years, but where the use of a way is permissive, no prescriptive right to it is acquired, although it may have been used by the public for 15 years or more."

The cases involving aircraft usually state that the break line as to where compensable damages exists is time when trespass flights become so intolerable as to create such substantial interference as to constitute taking or incipient taking. U. S. v. 3276.21 Acres of Land (DC Cal.), 222 F. Supp. 887.

The Air Board alleges that the maximum elevation for the trees should be 20 feet. Inasmuch as the largest tree is over 50 feet in height and has been growing at the rate of 1 or 1½ feet per year, it is obvious that it has been in the alleged forbidden air space continuously for 20 to 30 years. If there are any prescriptive easements to air space involved in this case, they belong to the owners of the trees by virtue of them occupying the space for the last 20 to 30 years. The only use of this space by the Air Board has not been by airplanes, it was by the light rays emitted by the newly installed VASI equipment, which precipitated this action.

The reasons given by the Court of Appeals in its decision are all state grounds and are as follows:

> "The Air Board has no prescriptive right for the simple reason it has not exercised adverse rights in the space involved for fifteen years; however, it appears that in the instant case, the trees had exceeded the 20-foot elevation objected to before the commencement of the use of VASI quipment and before the adoption of rules and regulations applying thereto.
>
> "Appellants' right to maintain and enjoy their trees was acquired before the right of the Air Board was fixed by law. Although appellants'

> right was not in conformity with the zoning rules of K.A.Z.C., nevertheless, such right is protected by the Constitution and may not be taken except by condemnation under K.R.S. 183.133 (4) and (5)" (R. 49-50).

To this day the planes have never interfered with the trees and the trees have never interfered with the planes. The real reason that the petitioner wants the trees removed is that they interfere with their VASI equipment which was not installed until 1967.

Petitioner is trying to enlarge on its approaching rights of take-offs and landings to include an entirely new, larger and different purpose, that being the VASI equipment.

The law of Kentucky and most States is well expressed in 25 Am. Jur. 2d Easements and Licenses, Section 84 which provides:

> "The character and extent of a prescriptive easement are fixed and determined by the user under which it was acquired. No different or materially greater use can be made of such an easement, except by further adverse user for the prescriptive period, or by the acquisition of additional rights in some other manner."

These are all valid state grounds abundantly adequate and independent of any federal law and violating none.

**B. The Judgment Sought to be Reviewed is in no Way Contrary to Griggs v. Allegheny County, 369 U. S. 84.**

The only jurisdictional reason given in the petition that the Court should review this matter is that the decision is not in accordance with Griggs v. Allegheny County, 369 U. S. 84. In that case the planes were flying as close as 30 to 50 feet over the residence and the facts were summarized as follows:

> "Regular and almost continuous daily flights often several minutes apart, have been made by a number of airlines directly over and very, very close to plaintiff's residence. During these flights it was often impossible for people in the house to converse or to talk on the telephone. The plaintiff and the members of his household (depending on the flight which in turn sometimes depended on the wind) were frequently unable to sleep even with ear plugs and sleeping pills; they would frequently be awakened by the flight and the noise of the planes; the windows of their home would frequently rattle and at times plaster fell down from the walls and ceilings; their health was affected and impaired, and they sometimes were compelled to sleep elsewhere. Moreover, their house was so close to the runways or path of glide that as the spokesman for the members of the Airlines Pilot Association admitted 'If we had engine failure we would have no course but to plow into your house.' "

The Court rightfully held under those facts that the airport had in effect condemned an easement and should therefore pay compensation. If such condi-

tions prevailed and continued for a period of fifteen years in Kentucky, it might very well be argued that the airport's rights ripened and they acquired an easement by prescription—but such is not the case. The facts in this case are not only distinguishable they are even antithetical. Stipulation No. 12 (R. 11) provides:

> "Although the number of flights and noise level near and over the defendants' property have gradually increased, the defendants have never complained to the Air Board nor has there been any damage to their property as a result of said flights."

Petitioner makes much of the fact that the airport is the proper Agency to bring the action under Griggs v. Allegheny County, Respondents have no quarrel with this and have never made it an issue and thus find it ungermane.

The Kentucky Court of Appeals did no violence or harm to the decision as it is not applicable to this case.

The Allegheny case alluded to U. S. v. Causby, 328 U. S. 256 in saying that:

> "The use of land presupposes the use of some of the airspace above it. 328 U. S., at 264. Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected."

## CONCLUSION.

Although this case is important to the parties it does not present any unique or novel principles of law at this time. The case was thoughtfully decided on well settled state laws none of which are contrary to the federal law.

The petitioner has an adequate remedy under state law of condemnation. This is a powerful weapon and is harsh in its effect. The respondents do not look forward to it but to deprive them of their shade trees without any compensation whatsoever would be worse. The petitioner is seeking all the benefits of condemnation without exercising the correlative duty of paying just compensation. The compensation would in no way reimburse respondents for the personal importance they attach to the trees or for their costs in protecting their rights in the trees.

The law, the equities and the feelings are on the side of the respondents. There is no valid reason why the Judgment of the Court of Appeals of Kentucky should be disturbed. If God makes a tree grow then petitioner can pay for respondents' trees it wishes to cut down. It is for these reasons as well as those advanced in the argument that we respectfully request the petition for writ of *certiorari* to be dismissed.

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